LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 8 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 252

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC.
and LOUIE J. SPEED, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

MOTION TO DISMISS

GEORGE MISKOVSKY,
W. J. HOLLOWAY, SR.,
M. A. NED LOONEY,
CLYDE J. WATTS,
Attorneys for Appellees.

Of Counsel:
MISKOVSKY & MISKOVSKY,
Hightower Building,
Oklahoma City, Oklahoma.
W. J. HOLLOWAY, SR.,
First National Building,
Oklahoma City, Oklahoma.
LOONEY, WATTS, ROSS, LOONEY & NICHOLS,
First National Building,
Oklahoma City, Oklahoma.

Counsel of Record:
M. A. NED LOONEY,
First National Building,
Oklahoma City, Oklahoma.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 252

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC.
and LOUIE J. SPEED, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

MOTION TO DISMISS

Appellee moves pursuant to Rule 16, Supreme Court Rules (28 U. S. C.) to dismiss the appeal herein on the grounds that the appeal does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

This is another skirmish in the now famous Safeway battle for the expanding Southwest market that has erupted in numerous indictments, complaints, injunctions and sentences.*

---

* *E.g. United States* v. *Safeway Stores, Inc. et al.*, CCH TRADE REG. REP. (1957 Trade Cas.) Par. 68,770 (N.D. Texas, 1957), in which the court accepted pleas of nolo contendere from all of the defendants in a criminal prosecution which charged a conspiracy to monopolize the retail grocery business in various cities in Texas and New Mexico; and *United States* v. *Safeway Stores, Inc.*, CCH TRADE REG. REP. (1957 Trade Cas.) Par. 68,871 (N.D. Texas 1957) terminated by consent decree, which judgment prohibited Safeway from selling at prices below cost and operating retail stores below the cost of doing business for the purpose of attempting to monopolize retail grocery trade.

The specific market here involved is the rich Tulsa-Oklahoma City area. The remedy sought and obtained by the independent grocers through their Retail Grocers Association, was a permanent injunction against illegal price cutting. The defense claimed by Safeway, and rejected by both the trial court and the Oklahoma Supreme Court, was that the price cutting was done in good faith to meet competition.*

No doubt, the "Detroit Jobber" cases (*Standard Oil Co.* v. *FTC*, 340 U. S. 231 (1951); and *FTC* v. *Standard Oil Co.*, 355 U. S. 396 (1958)), have done much to revive interest in the defense of the good faith meeting of competition when the charge is that of discriminatory pricing under Robinson-Patman (15 U. S. C. §§13, 13a, 13b, 21a (1952)). Probably the criteria there defined are also relevant in an action based on a local unfair sales act.**

However, Safeway's reliance on the good faith defense is particularly inappropriate here in the light of the explicit finding by the Oklahoma Supreme Court that:

> "* * * Safeway obviously and admittedly did not, in good faith, set the price of its articles which were subject to the Unfair Sales Act on the basis of its competitors' prices which it in good faith believed to be legal prices under the Unfair Sales Act, but on the contrary it set illegal prices for the sole purpose of meeting prices of its competitors, which it thought to be illegal" (Appendix A, pp. 26-27).

---

* The opinion of the Supreme Court of Oklahoma, reported at 322 P. 2d 179 (Okla. 1957), and the opinion of the District Court of Oklahoma County reported in CCH TRADE REG. REP. (1955 Trade Cas.) Par. 68,195, are printed in full as Appendix A to appellant's Jurisdictional Statement. The Oklahoma Unfair Sales Act, 15 Okla. Stat. 1951 §§598.1-598.11, is printed in full as Appendix B to appellant's Jurisdictional Statement. Hereinafter, references to these opinions and the statute will, for the Court's convenience, be cited as Appendix A (or B), p.

** Actually the Oklahoma Unfair Sales Act is more explicit than the Robinson-Patman Act in limiting competition to lawful prices. Section 598.7 provides: "Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer." (Appendix B, p. 68)

In the same vein as the Oklahoma Supreme Court, the trial court had rejected Safeway's claim of good faith with the following comment on the testimony of Safeway's chief administrative officer in the Oklahoma division, Mr. Christensen:

> "Mr. Christensen said,—he made this statement on cross examination,—that it was the policy of their company to cut prices regardless of illegality. It isn't right for a large Company like this, to do this, and at the same time Mr. Christensen also stated that he had never read the Unfair Sales Act,—hadn't read it to date,—last Monday or Tuesday." (Appendix A, *supra*, p. 56).

In its formal findings the trial court held:

> "3. That, on the dates set forth in plaintiff's petition, in Tulsa, Enid, Shawnee, and Norman, when defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, reduced its prices below cost to the retailer as aforesaid, allegedly to meet in good faith the prices of competitors who were on those dates selling the same articles or products of comparable quality at such prices, such advertising for sale, offering for sale, and selling by the defendant, Safeway Stores, Inc., at said reduced prices was not in good faith to meet the prices of competitors selling the articles at cost to them as defined by the Oklahoma 'Unfair Sales Act' but was the meeting of prices which the defendant, Safeway Stores, Inc., either knew or had reason to know were illegal prices and was therefore without legal justification.
>
> "4. That, on the dates set forth in plaintiff's petition, in Oklahoma City, Midwest City, Tulsa, Enid, Shawnee, and Norman, defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, did advertise for sale, offer for sale, and sell the specified items of merchandise at less than cost to the retailer as defined by the Oklahoma

> 'Unfair Sales Act' with the intent and purpose of unfairly diverting trade from its competitors, which acts constituted unfair competition, were contrary to public policy, and were in violation of the Oklahoma 'Unfair Sales Act'." (Appendix A, *supra*, p. 43).

This motion to dismiss, then, is grounded in the first instance on explicit findings of fact by the trial court, explicitly authenticated by the Oklahoma Supreme Court that Safeway's price cutting was not in good faith—findings of fact not lightly to be disturbed by this Court. *Pennekamp* v. *Florida*, 328 U. S. 331, 345; *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293, 294 (1940).

Moreover, Safeway misconceives the scope of the good faith defense. The "core of the defense", as this Court has stated, "consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain the customer, may in good faith meet that lower price." *Standard Oil Co.* v. *FTC*, *supra*, 340 U. S. at 242. The emphasis there was on lawful prices, as it has been ever since, if not even before, this Court's opinion in *FTC* v. *Staley Manufacturing Co.*, 324 U. S. 746. Finally, the entire rationale of the majority opinion in the second *Standard Oil* decision rests on the statement that there was "no showing or serious contention by the Commission" that the offers which Standard met were themselves unlawful. (355 U. S. at 399 n. 4). As the dissenting opinion emphasizes:

> "We said in *Standard Oil Co.* v. *Federal Trade Comm'n*, 340 U. S. 231, 250, 'Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a *lawful* and *equally low price* of its competitor.' (Italics added.) It is only a *lawful* lower price that may be met. Were it otherwise then the law to govern is not the Robinson-Patman Act but the law of the jungle" (*Id.* at 408).

Matched against these criteria—criteria equally indispensable to enforcement of the Robinson-Patman Act and

the Oklahoma Unfair Sales Act—Safeway's systematic price cutting to meet all prices and even beat some, regardless of illegality, finds no protection within the good faith defense; and as a consequence, destroys Safeway's standing to mount any attack against the constitutionality of the Oklahoma Unfair Sales Act.

Safeway cannot shelter even under the extension to the good faith defense urged by the Attorney General's Report, to wit, that the unlawfulness of the equally low price met should not bar the defense unless the illegality of the competitor's price was known, or ought to have been known, by the price discriminator. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 181-2 (1955). The trial court and the Oklahoma Supreme Court both found that Safeway knew, or should have known, that the prices it met in Enid, Tulsa, Shawnee and Norman were illegal prices, as were the prices Safeway set to beat its competition in Oklahoma City (Appendix A, *supra,* p. 43 and pp. 26-27 respectively).

Taken, then, in the frame of reference of the "Detroit Jobber" cases, the *Staley* decision and the broad construction suggested by the Attorney General's Report, *supra,* it is quite clear as found by both the trial court and the Supreme Court of Oklahoma that Safeway's price cuts were part of a pricing scheme, admittedly ordered by Mr. Christensen, "to cut prices regardless of illegality", which system was not made in good faith to meet competition, but was for the purpose of diverting trade and injuring competition.

(1) Not being in good faith, the defense fails.

(2) The prices met in Enid, Tulsa, Shawnee and Norman being illegal and known to Safeway to be illegal, the defense fails.

(3) The prices set by Safeway in Oklahoma City being lower than competition and illegal as well, the defense fails.

(4) And, finally, not having been made to meet competition, but actually pursuant to a pricing system designed to divert, not hold, trade, the defense fails.

Safeway, the "hardened antitrust violator",* was not deprived of the good faith defense. Rather, it never qualified for it. To say in the face of these findings of fact by the trial court and the Oklahoma Supreme Court that Safeway was denied due process and the equal protection of the laws is to assert the novel proposition that every litigant who fails to sustain the burden of proving his bona fides thereby creates a federal question entitling him to Supreme Court review.

What Safeway apparently fails to appreciate is that having been found wanting on the crucial issue of its good faith, it now has no standing to raise issues concerning the constitutionality of the Oklahoma Unfair Sales Act.

Failing to justify its own price cutting under the Act, Safeway endeavors to reach the same objective through a collateral attack on the constitutionality of the Act itself. Its object in either case is to strip the independent grocers of their main bulwark against the repetition of such predatory practices. It is Safeway's argument that, accepting, *arguendo,* the justice of the injunction against it for illegal price cutting, the giving of trading stamps on minimum priced groceries ought also be enjoined; that the state courts' failure to grant Safeway's cross petition so to enjoin constitutes a denial of due process or of equal protection of the laws.

This left handed attempt to raise federal issues of due process and equal protection via trading stamps comes

---

* "The [Justice] Department, moreover, was aware that Safeway was a hardened antitrust violator, having pleaded nolo contendere in 5 of the 6 times it faced criminal indictments. Such a distressing record would indicate that routine Government antitrust action would have but slight deterrent effect upon the mischievous management of this corporation." Senate Committee on Small Business, *The Role of Private Antitrust Enforcement in Protecting Small Business,* S. Rep. No. 1855, 85th Cong. 2d Sess. 6 (1958).

rather late. There is no question that state minimum pricing statutes are constitutionally permissible.

> "[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. * * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." (*Nebbia* v. *New York*, 291 U. S. 502, 537, 539 (1935)).

On such reasoning the constitutionality of the instant act was upheld by the Oklahoma Supreme Court. *Adwon* v. *Oklahoma Retail Grocers Association, Inc.*, 204 Okla. 199, 228 P. 2d 376 (1951).*

Similarly, the decision of the Oklahoma Supreme Court that trading stamps are a discount for the prompt payment of cash and that a bona fide cash discount not exceeding 3% is not a price cut within the purview of the act is a decision neither unreasonable nor novel. Supreme courts of other states have come to the identical conclusion time and again in determining the impact of trading stamps on minimum pricing statutes (e.g. *Bristol-Myers Co.* v. *Lit Bros. Inc.*, 336 Pa. 81, 6 A. 2d 843 (1939); *Food and Grocery Bureau, Inc.* v. *Garfield*, 20 Cal. 2d 228, 125 P. 2d 3 (1942); *Trade Commission* v. *Bush*, 123 Utah 302, 259 P. 2d 304 (1953); *Sperry and Hutchinson* v. *Margetts*, 15 N. J. 203, 104 A. 2d 310 (1954); *Gever* v. *American Stores Co.*, 387 Pa. 206, 127 A. 2d 694 (1956). *See also, Weco Products Co.* v. *Mid-City Cut Rate Drug Stores*, 55 Cal. App. 2d 684, 131 P. 2d 856 (1942)).

---

* Unfair sales acts, similar to, if not identical with, the Oklahoma Unfair Sales Act, are in force in more than twenty-five other states (see chart, 2 CCH TRADE REG. REP., State Laws 7503). Their constitutionality is well documented by decisions of the respective state supreme courts (*e.g. People* v. *Payless Drug Store*, 25 Cal. 2d 108, 153 P. 2d 9 (1944); *State* v. *Langley*, 53 Wyo. 332, 84 P. 2d 767 (1938); *State* v. *Ross*, 259 Wis. 379; 48 N.W. 2d 460 (1951); *State* v. *Sears*, 4 Wash. 2d 200, 103 P. 2d 337 (1940); *Associated Merchants* v. *Ormesher*, 107 Mont. 530, 86 P. 2d 1031 (1939).

At this stage in the decisional stream, the issues tendered by Safeway require no resort to federal constitutional law, being well within states' rights precedents already unequivocably established. As here decided by the Supreme Court of Oklahoma, this local issue rests on an adequate non-federal basis; and, as such, raises no substantial federal question deserving of this Court's review. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74 (1954); and *Ashwander* v. *Valley Authority*, 297 U. S. 288, 347 (1935).

WHEREFORE, the appellee respectfully moves that this appeal be in all respects dismissed.

Respectfully submitted,

GEORGE MISKOVSKY,
W. J. HOLLOWAY, SR.,
M. A. NED LOONEY,
CLYDE J. WATTS.

Of Counsel:

MISKOVSKY & MISKOVSKY,
Hightower Building,
Oklahoma City, Oklahoma.

W. J. HOLLOWAY, SR.,
First National Building,
Oklahoma City, Oklahoma.

LOONEY, WATTS, ROSS, LOONEY & NICHOLS,
First National Building,
Oklahoma City, Oklahoma.

Counsel of Record:

M. A. NED LOONEY,
First National Building,
Oklahoma City, Oklahoma.

Proof of Service

I, M. A. NED LOONEY, one of the attorneys for Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc., Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of September, 1958, I served copies of the foregoing Motion to Dismiss on Safeway Stores, Incorporated, a corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to its respective attorneys as follows:

Of Counsel:

EMBRY, CROWE, TOLBERT, BOXLEY & JOHNSON,
570 First National Building,
Oklahoma City, Oklahoma.

CLARK, REED & CLARK,
1900 Adolphus Tower,
Dallas 2, Texas.

Counsel of Record:

ROBERT L. CLARK,
1900 Adolphus Tower,
Dallas 2, Texas.

.....

M. A. NED LOONEY,
First National Building,
Oklahoma City, Oklahoma,
Attorney for Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc.